

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

BEFORE THE ADMINISTRATOR

In re:)
Premium Waters, Inc.)
APL-004-06) **Decision**

This Decision is in response to an appeal (APL-004-06) of a proposed denial of National Organic Program certification to Premium Waters, Inc., by the American Food Safety Institute International (AFSII), for the production of a product deemed not certifiable under the Organic Foods Production Act of 1990 (Act)¹ and the regulations promulgated thereunder.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, and handling operations to the National Organic Standards (7 CFR Part 205). Certifying agents also initiate compliance actions to enforce program requirements. Noncompliance procedures are set forth in Section 205.662 of the NOP regulations. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the Administrator pursuant to Section 205.680 of the NOP regulations.

FINDINGS OF FACT

- 1) The American Food Safety Institute International (AFSII), Chippewa Falls, Wisconsin, was granted USDA accreditation on February 10, 2003. Karl Kolb, Ph.D. is the President.³

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

³ The American Food Safety Institute International falls under the umbrella of the High Sierra Group companies. Headquartered in Chippewa Falls, Wisconsin, the High Sierra Group is comprised of the

- 2) Greg Nemec, President, Premium Waters, Inc., Minneapolis, Minnesota, completed an Organic Handler/Processor Plan on May 31, 2005, to obtain organic certification from AFSII for a spring water operation located in Chippewa Falls, Wisconsin. In conjunction with this plan, Mr. Nemec submitted a Certification Application which specified that the scope of certification would encompass packer, processor and wholesale/retailer.
- 3) (b)(6) / (b)(7)(C) inspected Premium Waters' Chippewa Falls facility on June 7, 2005. On June 16, 2005, AFSII issued organic certification to Premium Waters, Inc., as a processor/handler.
- 4) According to Mark Bradley, Associate Deputy Administrator, National Organic Program (NOP), a representative of a major retailer observed a Premium Waters promotion for certified organic spring water to be sold under private label. The party in attendance reported this to the NOP in December 2005.
- 5) On December 9, 2005, Mr. Bradley informed Dr. Kolb via e-mail that, "...labeling water as organic under the NOP standards and use of the NOP seal is a violation of Federal law. If your client labels or markets water as coming from a location or handling process certified under the NOP and/or uses the USDA Organic seal we would equally view it as a willful labeling violation." Dr. Kolb's response confirmed his understanding of NOP's position.⁴
- 6) Greg Nemec notified Dr. Kolb via e-mail on December 9, 2005, that Premium Waters, "... has stopped every aspect of the marketing or sale of products marked "Organic,"" and would appeal USDA's stance.

American Food Safety Institute International, the American Food Safety Institute, the High Sierra Chemical Company, the High Sierra Laboratories and the High Sierra Publishing Company.

⁴ Mr. Bradley's directive was also in response to Mr. Kolb's disclosure in an e-mail, dated December 9, 2005, that only the ground and handling process had been certified.

- 7) Mr. Nemec, in a letter to Mark Bradley, dated December 20, 2005, stated his intent to appeal and requested a formal document from NOP explaining the reason(s) for excluding water from organic certification.
- 8) On January 6, 2006, AFSII issued a written denial of certification to Premium Waters. The basis for the denial, as explained in the letter, was the exclusion of water from organic product composition calculations per §205.301(b) Product Composition.⁵
- 9) In response to this notification, Mr. Nemec submitted a proper appeal to contest the denial of organic certification of natural spring water. Mr. Nemec argued that:
 - a) 7 CFR 205.301 excludes water from certification as an ingredient in a product, but not when water is the sole product; b) natural spring water is not excluded or otherwise disqualified by the National List of Allowed and Prohibited Substances; c) bottled water is recognized as a processed food product as evidenced by FDA, state and local agencies inspecting bottled water facilities, as well as, U.S. Customs Service categorization, d) the NOP permits the certification of flavored natural waters in which the flavoring is certified organic, but water is subtracted from the organic composition measurements, and; e) water has been certified as organic in the U.K. and Australia (Mangrove Mountain Spring).⁶
- 10) On February 3, 2006, Mr. Nemec amended his appeal letter to reiterate that arguments a and b, above, and provided a rationale to permit the certification of natural spring water from a secure source.

⁵ Products sold, labeled, or represented as “organic.” A raw or processed agricultural product sold, labeled, or represented as “organic” must contain [by weight or fluid volume, excluding water and salt] not less than 95 percent organically produced raw or processed agricultural products.

⁶ One USDA accredited certifying agent has certified operations in the UK. None of these operations have been certified for the production, processing or handling of water. Furthermore, according to the Mangrove Mountain Spring website, the spring water is certified by Australian Certified Organic for conformity to the Australian Organic Standards, version 5. There is no claim that such product is certified to the NOP standards.

- 11) On May 1, 2006, in response to a question from Compliance Officer, Shannon Nally, Mr. Nemec asserted that no finished product was produced or sold.
- 12) On June 14, 2006, Mark Bradley confirmed that water is not an agricultural product under the NOP and is not eligible for organic certification.

DISCUSSION

The appellant attempted to obtain organic certification for a spring water collection and bottling operation. According to the record, the agent granted a processing/handling certificate with the apparent intent that by certifying the ground at the collection site and the bottling facility, the water could be labeled as organic.

The agent subsequently issued a denial of certification citing the regulatory provision which excludes water from the percent of organic products in a raw or processed product labeled as organic. The appellant maintained that no product was sold or labeled as organic under the scope of that certificate before it was invalidated.

The appellant asserted that under the regulations, water could be certified as an organic product. To support this assertion, the appellant cited the following examples: a) labeling standards do not include water in calculating the percentage of organically produced ingredients in a product, thereby excluding water as a certified organic ingredient but not a certified organic product, and b) water is absent from the National List of Allowed and Prohibited Substances.

The appellant further argued that both water and flavoring can be labeled as organic in flavored natural water products. The appellant also cited certification practices in other countries and the classification of water by other U.S. Federal agencies as a food product, in support of the certification of water as an organic product, the certification of the land in the water catchment area, and the handling process.

CONCLUSIONS

The agent's denial of organic certification for the production of spring water was appropriate. Water is not an agricultural product as defined by the NOP and, therefore, the certification of the production, processing or handling of water as organic is not permitted. The NOP, however, has no jurisdiction over water products which do not bear the USDA seal and have been certified as organic according to standards other than the NOP.

Pursuant to §205.301 Product composition, the regulations further prohibit the use of the term organic to modify water as an ingredient. Organic flavored water products are allowed provided that the word "organic" is clearly used to describe the flavoring and not the water.

The exclusion of water from the National List of Allowed and Prohibited Substances, and the classification of water by other Federal agencies have no bearing upon the eligibility of water for organic certification under the NOP.

DECISION

The appeal is denied.

Done at Washington, D.C., on this _7th____
day of _September_____, 2006.

/s/

Lloyd C. Day
AMS Administrator